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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 TIM MONG,

10 Plaintiff,

11 v.
12

13 CAROLYN W. COLVIN,
14 Commissioner of Social Security,

15 Defendant.
16

No. 1:15-CV-03050-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

17 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
18 No. 13, 14. Attorney D. James Tree represents Timothy C. Mong (Plaintiff);
19 Special Assistant United States Attorney Alexis L. Toma represents the
20 Commissioner of Social Security (Defendant). The parties have consented to
21 proceed before a magistrate judge. ECF No. 7. After reviewing the administrative
22 record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion
23 for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment;
24 and **REMANDS** the matter to the Commissioner for additional proceedings
25 pursuant to 42 U.S.C. § 405(g).

26 **JURISDICTION**

27 Plaintiff filed applications for Supplemental Security Income (SSI) and
28 Disability Insurance Benefits (DIB) on October 13, 2011, alleging disability since

1 July 1, 2008, due to possible obesity, back pain, diabetes, high blood pressure, high
2 cholesterol, depression, and weakness in his legs. Tr. 302-314, 344, 348. The
3 applications were denied initially and upon reconsideration. Tr. 144-161, 164-177.
4 Administrative Law Judge (ALJ) Ilene Sloan held a hearing on June 20, 2013, at
5 which Plaintiff, represented by counsel, and vocational expert, Frederick Cutler,
6 testified. Tr. 33-67. The ALJ issued an unfavorable decision on October 24, 2013.
7 Tr. 16-27. The Appeals Council denied review on January 27, 2015. Tr. 1-5. The
8 ALJ's October 24, 2013, decision became the final decision of the Commissioner,
9 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
10 filed this action for judicial review on March 27, 2015. ECF No. 1, 4.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff was 38 years old at the alleged date of onset, July 1, 2008. Tr. 302.
16 Plaintiff completed the tenth grade in 1987. Tr. 349. Plaintiff alleges that he
17 stopped working on July 1, 2008, because of his conditions. Tr. 348. Earnings
18 records show that Plaintiff worked in 2008 and 2009. Tr. 322. Plaintiff has work
19 history as a cook, fast food cook, and merchandizer. Tr. 349, 355.

20 On May 1, 2013, Plaintiff was examined by Jeffrey R. Merrill, M.D. Tr.
21 530-545. Plaintiff reported he had been uninsured for the past five months,
22 resulting in a lack of prescription medication. Tr. 531. His blood glucose level
23 was 415, his A1C was greater than fourteen, and he had trace ketones in his urine.
24 Tr. 532. Plaintiff weighed 201.5 pounds with a BMI of 25.18, and Dr. Merrill
25 noted that his abdominal wall "is largely excess skin folds from his obviously
26 severe former level of obesity." Tr. 533. During the examination, Dr. Merrill
27 noted that Plaintiff was "ill appearing," and he had "an absolutely massive [right]
28 hemiscrotum, 20 cm+, with no way to determine the presence of the [right] testis."

1 *Id.* Dr. Merrill referred to this hernia as “mammoth,” and indicated that “[r]epair
2 will be difficult but will be necessary.” Tr. 530. Following the examination, Dr.
3 Merrill opined that Plaintiff was unable to meet the demands of sedentary work
4 and estimated the current limitation would persist for six months with treatment.
5 Tr. 543.

6 At the hearing, Plaintiff testified that he was currently taking insulin, but had
7 not been able to see his doctor to restart six or seven medications he was on prior
8 to losing his insurance. Tr. 42. Additionally, the record does not show whether
9 Plaintiff received any additional care for his hernia.

10 **STANDARD OF REVIEW**

11 The ALJ is responsible for determining credibility, resolving conflicts in
12 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
13 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law *de novo*,
14 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
15 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
16 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
17 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
18 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
19 another way, substantial evidence is such relevant evidence as a reasonable mind
20 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
21 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
22 interpretation, the court may not substitute its judgment for that of the ALJ.
23 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
24 evidence will be set aside if the proper legal standards were not applied in
25 weighing the evidence and making the decision. *Browner v. Secretary of Health*
26 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
27 supports the administrative findings, or if conflicting evidence supports a finding
28 of either disability or non-disability, the ALJ’s determination is conclusive.

1 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

2 **SEQUENTIAL EVALUATION PROCESS**

3 The Commissioner has established a five-step sequential evaluation process
 4 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 5 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 6 through four, the burden of proof rests upon claimants to establish a prima facie
 7 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 8 burden is met once claimants establish that physical or mental impairments prevent
 9 them from engaging in their previous occupations. 20 C.F.R. §§ 404.1520(a)(4),
 10 416.920(a)(4). If claimants cannot do their past relevant work, the ALJ proceeds
 11 to step five, and the burden shifts to the Commissioner to show that (1) the
 12 claimants can make an adjustment to other work, and (2) specific jobs exist in the
 13 national economy which claimants can perform. *Batson v. Comm'r of Soc. Sec.*
 14 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an
 15 adjustment to other work in the national economy, a finding of “disabled” is made.
 16 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

17 **ADMINISTRATIVE DECISION**

18 On October 24, 2013, the ALJ issued a decision finding Plaintiff was not
 19 disabled as defined in the Social Security Act.

20 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 21 activity since July 1, 2008, the alleged date of onset.¹ Tr. 18.

22
 23
 24 ¹Plaintiff amended his alleged onset date to September 1, 2011, through a
 25 letter from counsel on July 8, 2013. Tr. 407. Despite this letter, the ALJ made a
 26 determination from July 1, 2008, to October 24, 2013. Tr. 27. The Court’s review
 27 is limited to the final decision of the Commissioner. 42 U.S.C. § 405(g). Here the
 28 ALJ’s determination is the final decision of the Commissioner. Therefore, the

1 At step two, the ALJ determined Plaintiff had the following severe
2 impairments: focal spondylosis at L1-L2 and L5-S1, degenerative joint disease of
3 the hips, mood disorder not otherwise specified, and diabetes mellitus type II. Tr.
4 18-19.

5 At step three, the ALJ found Plaintiff did not have an impairment or
6 combination of impairments that met or medically equaled the severity of one of
7 the listed impairments. Tr. 19-21.

8 At step four, the ALJ assessed Plaintiff's residual function capacity (RFC)
9 and determined he could perform a range of light work with the following
10 limitations:

11 The claimant can occasionally climb ladders, ropes, and scaffolds and
12 can frequently stoop. He can climb ramps and stairs, balance, kneel,
13 crouch and crawl unlimitedly. The claimant can perform work that
14 avoids even moderate exposure to hazards such as unprotected heights
15 and moving machinery. The claimant can understand, remember, and
16 carry out simple instructions as well as some detailed instructions.
17 The claimant is able to maintain concentration in two-hour intervals
before requiring a 15-minute break to refocus.

18 Tr. 21. The ALJ determined that Plaintiff had past relevant work as a newspaper
19 delivery driver, home health aide, baker helping, short order cook, and kitchen
20 helper. Tr. 25. The ALJ found Plaintiff was able to perform his past relevant work
21 as a short order cook. Tr. 24.

22 In the alternative to a step four determination denying benefits, the ALJ
23 made a step five determination that, considering Plaintiff's age, education, work
24 experience and RFC, and based on the testimony of the vocational expert, there
25 were other jobs that exist in significant numbers in the national economy Plaintiff
26

27 Court will review the determination from July 1, 2008, through the date of the
28 ALJ's decision.

1 could perform, including the jobs of fast food worker, cashier II and assembly. Tr.
2 26. The ALJ thus concluded Plaintiff was not under a disability within the
3 meaning of the Social Security Act at any time from July 1, 2008, through October
4 24, 2013, the date of the ALJ's decision. Tr. 27.

5 ISSUES

6 The question presented is whether substantial evidence supports the ALJ's
7 decision denying benefits and, if so, whether that decision is based on proper legal
8 standards. Plaintiff contends the ALJ erred by (1) improperly rejecting a portion of
9 Dr. Merrill's opinion; (2) improperly considering Plaintiff's failure to follow
10 prescribe treatment; and (3) failing to properly consider Plaintiff's testimony about
11 the severity of his symptoms.

12 DISCUSSION

13 A. Weight given Dr. Merrill's Opinion

14 Plaintiff argues that the ALJ erred through an implicit rejection of Dr.
15 Merrill's opinion that Plaintiff was unable to meet the demands of sedentary work.
16 ECF No. 13 at 15-20.

17 In weighing medical source opinions, the ALJ should distinguish between
18 three different types of physicians: (1) treating physicians, who actually treat the
19 claimant; (2) examining physicians, who examine but do not treat the claimant; and
20 (3) nonexamining physicians who neither treat nor examine the claimant. *Lester v.*
21 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more weight to the
22 opinion of a treating physician than to the opinion of an examining physician. *Orn*
23 *v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007) (citing 20 C.F.R. § 404.1527(d)(1)-
24 (2)). The ALJ should give more weight to the opinion of an examining physician
25 than to the opinion of a nonexamining physician. *Id.*

26 When an examining physician's opinion is not contradicted by another
27 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
28 *Lester*, 81 F.2d at 830. When an examining physician's opinion is contradicted by

1 another physician, the ALJ is only required to provide “specific and legitimate
2 reasons” for rejecting the opinion of the examining physician. *Id.* at 830-831.

3 Here, the ALJ implicitly rejected the opinion of Dr. Merrill. *See infra.* The
4 implied reasons for rejecting the opinion failed to meet even the lesser standard of
5 specific and legitimate. Therefore, these reasons were not legally sufficient.

6 On May 1, 2013, Dr. Merrill evaluated Plaintiff and opined that he was
7 unable to meet the demands of sedentary work, stating: “[h]e is weak and actively
8 compromised by out of control diabetes and probably has been for months. He
9 will definitely improve with treatment through this will not be an overnight
10 project.” Tr. 530, 543. Dr. Merrill estimated that the work limitations would
11 persist for six months with available medical treatment. Tr. 543. Dr. Merrill
12 recommended immediate access to insulin and primary care and consult with
13 general surgery and urology for repair of the hernia. *Id.* Dr. Merrill stated that he
14 was only an examining physician, but due to the “imminent danger of slipping into
15 [diabetes ketoacidosis],” he felt obligated to provide some prescriptions. Tr. 530.
16 The ALJ gave “great weight” to this opinion:

17 He opined the claimant was unable to meet the demands of sedentary
18 work. He opined the claimant’s level of limitations would last six
19 months with appropriate treatment. He noted the need for immediate
20 access to insulin and primary care. I give Dr. Merrill’s opinion great
21 weight, specifically his opinion that the claimant’s impairment would
22 last no more than six months. This is consistent with contemporaneous
23 treatment records showing the claimant’s diabetes was not well
24 controlled. Ex. 13F. He opined the claimant would “definitely
25 improve” with treatment. Ex. 13F/1. Dr. Merrill’s evaluation highlights
26 the need for the claimant to comply with treatment. It is consistent with
27 the medical evidence showing the claimant’s diabetes was not under
28 control due to non-compliance.

Tr. 24.

Despite the great weight given to this opinion, the residual functional
capacity determined by the ALJ is for a limited range of light work. Tr. 21. If a

1 residual functional capacity assessment conflicts with an opinion from a medical
2 source, the adjudicator must explain why the opinion was not adopted. S.S.R. 96-
3 8p. Here, the ALJ failed to explain why she did not adopt Dr. Merrill's opinion
4 that Plaintiff was unable to meet the demands of sedentary work. Through the
5 ALJ's reference to Plaintiff's non-compliance, she implies that six months have
6 passed and Plaintiff's limitations had improved with treatment as predicted by Dr.
7 Merrill. But the record fails to support this implication. There is no evaluation
8 after Dr. Merrill's opinion. The record does contain a May 29, 2013, Physical
9 Residual Functional Capacity Assessment completed by single decisionmaker,
10 Carol Fundanet, who found Plaintiff "presently capable of less than sed[entary]"
11 residual functional capacity assessment based on Dr. Merrill's opinion. Tr. 546-
12 553. The record is void of any evidence showing that Plaintiff received treatment
13 for his diabetes or underwent surgery for his hernia. At the June hearing, Plaintiff
14 testified that he was waiting to see his doctor to talk about returning to his
15 medications. Tr. 42-43. Therefore, the ALJ's implicit determination on October
16 of 2013 that Plaintiff's impairments improved with treatment is not supported by
17 the record. Therefore, the ALJ failed to adequately address why her residual
18 functional capacity assessment differs with Dr. Merrill's opinion.

19 The ALJ's statements concerning Dr. Merrill's opinions could also be read
20 to imply that any of Plaintiff's limitations resulting from his failure to follow
21 prescribed treatment should not be considered in forming the residual functional
22 capacity assessment. Generally, impairments that can be controlled effectively
23 with medication are not disabling for the purpose of determining eligibility for
24 benefits. *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.
25 2006). However, a failure to follow a course of treatment may be excused, if the
26 claimant's noncompliance is attributable to his mental illness, *Molina*, 674 F.3d at
27 1114, or if the claimant cannot afford the treatment, *Gamble v. Chater*, 68 F.3d
28 319, 321 (9th Cir. 1995). Here, the ALJ failed to consider the reasons for

1 Plaintiff's failure to follow prescribed treatment.

2 The record contains several references that address whether Plaintiff's
3 limited intellect or lack of funds affected his ability to follow prescribed treatment.
4 On September 23, 2011, Plaintiff presented to the emergency room with his
5 glucose levels at 400. Tr. 499. He reported dropping his insulin vial and stepping
6 on it. Tr. 498. Additionally, he had missed his appointment on the Tuesday prior.
7 *Id.* On November 21, 2011, Plaintiff presented to the emergency room with a
8 glucose level of 700. Tr. 494. He had missed an appointment with his primary
9 care provider and his insurance would not cover another appointment until the
10 following month. *Id.* He was out of insulin and needed a refill of syringes. *Id.* In
11 December 2011, Jay M. Toews, Ed.D., found that Plaintiff "appears to function in
12 the Low Average range of intelligence," and diagnosed Plaintiff with a history of
13 attention deficit disorder, in full remission, a mood disorder, and passive-
14 submissive traits. Tr. 442-443. On July 17, 2012, Plaintiff was seen at the
15 emergency room with his glucose at 600. Tr. 479. At that time, he was no longer
16 able to see his primary care doctor because he could not pay the \$25.00 missed
17 appointment fee, his glucometer was broken, and he was out of his metformin. *Id.*
18 On May 1, 2013, Plaintiff had a glucose level of 415 and an A1C of greater than
19 14. Tr. 532. He had lost his insurance coverage and was without medications for
20 five months. Tr. 531. Dr. Merrill noted that he thought Plaintiff's difficulty with
21 managing his diabetes went beyond access to care. Tr. 530. In his Function
22 Report, Plaintiff alleged that he needed reminders to take medication and to attend
23 appointments. Tr. 396.

24 Considering the ALJ's lack of explanation as to why he did not include
25 limitations from Dr. Merrill's opinion in the residual functional capacity
26 assessment, remand is necessary for the ALJ to properly address Dr. Merrill's
27 opinion and Plaintiff's resulting residual functional capacity assessment.
28 Additional medical evidence is also necessary to show what, if any, treatment

1 Plaintiff received after May 2013 and if the treatment improved his residual
2 functional capacity assessment from that opined by Dr. Merrill.

3 **B. Plaintiff's Failure to Follow Prescribed Treatment**

4 Plaintiff argues that the ALJ denied his claim based on the premise that his
5 ability to work would be restored if he had followed prescribed treatment. ECF
6 No. 13 at 13-15. Specifically, Plaintiff asserts that the ALJ failed to meet the
7 requirements of S.S.R. 82-59, which delineates the circumstances in which an ALJ
8 can deny benefits on the basis that the claimant had failed to follow prescribed
9 treatment. *Id.*

10 The procedures mandated by S.S.R. 82-59 only apply to claimants who
11 would otherwise be disabled within the meaning of the Social Security Act.
12 *Roberts v. Shalala*, 66 F.3d 179 (9th Cir. 1995). Here, the ALJ did not determine
13 that Plaintiff would have otherwise been disabled but for his failure to follow
14 prescribed treatment. Thus, S.S.R. 82-59 does not apply.

15 However, Plaintiff's claim that portions of the ALJ's decision is premised on
16 the finding that Plaintiff failed to follow prescribed treatment is accurate. Plaintiff
17 specifically argues this point in reference to the ALJ's treatment of Dr. Merrill's
18 opinion. ECF No. 13 at 14. This argument has essentially been addressed above.
19 To the extend the ALJ may have additionally relied on the premise that Plaintiff
20 failed to follow prescribed treatment, the ALJ is instructed to consider the potential
21 reasons for Plaintiff's failure on remand. The Ninth Circuit has clearly held that
22 "[d]isability benefits may not be denied because of the claimant's failure to obtain
23 treatment he cannot obtain for lack of funds." *Gamble v. Chater*, 68 F.3d 319, 321
24 (9th Cir. 1995). Likewise, the Ninth Circuit has found that "we do not punish the
25 mentally ill for occasionally going off their medication when the record affords
26 compelling reason to view such departures from prescribed treatment as part of
27 claimants' underlying mental afflictions." *Garrison v. Colvin*, 759 F.3d 995, 1018
28 (9th Cir. 2014).

1 **C. Credibility**

2 Plaintiff contests the ALJ's adverse credibility determination. ECF No. 13
3 at 9-13.

4 Considering it is necessary that this case be remanded to readdress Dr.
5 Merrill's opinion and consider the reasons for Plaintiff's failure to follow
6 prescribed treatment, the ALJ is instructed to also consider Plaintiff's credibility on
7 remand.

8 **REMEDY**

9 The decision whether to remand for further proceedings or reverse and
10 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
11 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
12 where "no useful purpose would be served by further administrative proceedings,
13 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
14 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
15 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
16 (9th Cir. 1990). *See also Garrison*, 759 F.3d at 1021 (noting that a district court
17 may abuse its discretion not to remand for benefits when all of these conditions are
18 met). This policy is based on the "need to expedite disability claims." *Varney*,
19 859 F.2d at 1401. But where there are outstanding issues that must be resolved
20 before a determination can be made, and it is not clear from the record that the ALJ
21 would be required to find a claimant disabled if all the evidence were properly
22 evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96
23 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

24 In this case, it is not clear from the record that the ALJ would be required to
25 find Plaintiff disabled if all the evidence were properly evaluated. Further
26 proceedings are necessary for the ALJ to consider and weigh the opinion of Dr.
27 Merrill, to consider reasons for why Plaintiff failed to follow prescribed treatment,
28 and to address Plaintiff's credibility regarding his symptom reporting. The ALJ

1 will also need to form a new residual functional capacity determination after
2 supplementing the record and eliciting testimony from a medical expert.

3 **CONCLUSION**

4 Accordingly, **IT IS ORDERED:**

5 1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is
6 **DENIED**.

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
8 **GRANTED** and the matter is **REMANDED** to the Commissioner for additional
9 proceedings consistent with this Order.

10 3. Application for attorney fees may be filed by separate motion.

11 The District Court Executive is directed to file this Order and provide a copy
12 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
13 **and the file shall be CLOSED.**

14 DATED March 30, 2016.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE